

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CALHOUN COUNTY
Edgar W. Dickson, Circuit Court Judge

2017-CP-09-0130

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S.C. SUPREME COURT

Timothy J. Phillips, # 260439,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Timothy J. Phillips, # 260439, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed October 15, 2020¹, issued by the Honorable Edgar W. Dickson, Presiding Judge, First Judicial Circuit.



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December 1, 2020

¹ Counsel was never served with the filed Order and only became aware of its filing by searching the public index during an audit of files.

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STATE OF SOUTH CAROLINA
COUNTY OF CALHOUN

FILED

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

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Timothy J. Phillips, #260439,

Case No.: 2017-CP-09-0130

Applicant,

KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY
SOUTH CAROLINA

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

Timothy J. Phillips (Applicant) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Calhoun County Clerk of Court. During its November 2016, the Calhoun County Grand Jury indicted Applicant for kidnapping (2016-GS-09-0340). These charges stem from an incident on September 10, 2016; the victim was getting into her car at her residence when Applicant approached and knocked her to the ground, striking her with a pistol. Tr. p. 15. Applicant then forced the victim into her car and required her to drive at gunpoint to a nearby church. Tr. p. 15. Once arriving at the church, the victim began to beg for her life. Tr. p. 16. Applicant ultimately relented and ordered the victim to drive back to her house. Tr. p. 16. Applicant then fled in the victim's car. Tr. p. 16.

Martin R. Banks, Esquire, represented Applicant. Assistant Solicitor Theodore Lupton of the First Circuit Solicitor's Office prosecuted the case. On November 28, 2016, Applicant appeared in the Calhoun County Court of General Sessions before the Honorable Diane S. Goodstein, where he pled guilty as indicted. Judge Goodstein sentenced Applicant to imprisonment for twenty years. Judge Goodstein made a specific finding that Applicant was not to be placed on the sex offender registry as a result of his guilty plea.

On the same day as his guilty plea, Applicant, through counsel Banks filed a timely notice

1/11 

of appeal.

The South Carolina Court of Appeals dismissed Applicant's appeal on February 2, 2017, pursuant to Rule 203(d)(1)(B)(iv), SCACR, citing Applicant's failure to provide a sufficient explanation for his appeal. The remittitur was returned to the circuit court on February 17, 2017. Thereafter, Applicant filed a *pro se* petition for writ of certiorari on February 27, 2017. The South Carolina Supreme Court denied Applicant's petition on March 6, 2017.

II.

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
 - a. "Trial counsel coerced Applicant into entering a guilty plea through deceptive tactic when applicant wished to stand trial by jury."
 - b. "[I]t is clear counsel's performance was deficient because Applicant did not understand his rights, including the right to a direct appeal."
 - c. "[Applicant] did not fully understand the nature of the constitutional right being waived, [Applicant] only met with his attorney twice for approximately twenty minutes each time."
 - d. "It was never established that the [Applicant] understood the severity of the sentences they carried."
2. "Due process violation"
3. "Subject matter jurisdiction violation"
 - a. "[Applicant] will show that [the] State knowingly employed the use of unlawful procedures for the return and publication of its true-billed indictments."
 - b. "Invalid proceedings an[d] void indictment."
4. "Denial direct appeal"
 - a. "Defense counsel was ineffective for failing to properly advise the Applicant of the full scope of appellate review from an appeal of a guilty plea."
 - b. "Counsel'[s] failure to pursue the appeal was ineffective assistance of counsel."
5. "Pleas was not accepted by the court"

- a. “[Applicant] argues that the trial court never accepted his plea[,] the record do[es] not indicate that the Honorable Judge Diane Schafer Goodstein, Judge, accepted the plea in open court.”
6. “Elements violation”
 - a. “[Applicant] did not understand the elements in this case.”

Applicant amended his application on April 13, 2018 to include the following allegations:

1. Counsel was ineffective for providing erroneous and incorrect advice to Applicant about what sentence Applicant would receive, inducing Applicant to plead guilty instead of challenging the State’s evidence through the protections of trial, as Applicant desired, thus rendering Applicant’s plea unknowingly and involuntarily entered into.
2. Counsel was ineffective for failing to ensure that Applicant had sufficient notice of Applicant’s responsibilities to file memorandum to ensure that Applicant’s direct appeal was perfected, resulting in Applicant’s direct appeal being dismissed.
3. Counsel was ineffective for failing to conduct adequate amount of meeting with Applicant to review discovery so that Applicant would know of the allegations against him, thus rendering Applicant’s plea unknowingly and involuntarily entered into.
4. Counsel was ineffective for failure to conduct adequate investigation into the facts and circumstances surrounding Applicant’s case, thus depriving Applicant of knowledge of potential defenses, thus rendering Applicant’s plea unknowingly and involuntarily entered into.
5. Counsel was ineffective for failure to object to the Assistant Solicitor breaching the plea agreement, or failing to move to withdraw the plea.

Findings of Facts and Conclusions of Law

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses presented, which allowed the Court to scrutinize the credibility presented. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985). The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

3/11 

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland, 466 U.S. 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland does not guarantee perfect representation, only a "reasonably competent attorney." 466 U. S. at 687 (quoting McMann v. Richardson, 397 U. S. 759, 770 (1970)); Representation is constitutionally ineffective only if it "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair trial. Strickland, 466 U.S. at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities. See generally Id.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286, 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C.

4/1/89

at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, Wiggins, 539 U.S. at 526-527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Id. at 688; Harrington v. Richter, 562 U.S. 86 (2011)

With respect to prejudice, an applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687; Harrington, 562 U.S. 86.

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must

be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S. at 689–690. Even under de novo review, the standard for judging counsel’s representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings knew of materials outside the record and interacted with the client, with opposing counsel, and with the judge. It is “all too tempting” to “second-guess counsel’s assistance after conviction or adverse sentence.” *Id.* at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” not whether it deviated from best practices or most common custom. Strickland, 466 U.S at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel’s performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U. S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is “reasonably likely” the result would have been different. *Id.* at 696. This does not require a showing that counsel’s actions “more likely than not altered the outcome,” but the difference between Strickland’s prejudice standard and a more-probable-than-not standard is slight and matters “only in the rarest case.” *Id.* at 693, 697. The likelihood of a different result must be substantial, not just conceivable. *Id.* at 693; Harrington, 562 U.S. 86.

Based on this standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel as to any of his various allegations. Applicant’s allegation is addressed fully below:

Erroneous advice as to sentence

6/11 

This Court finds that Applicant has failed to show prejudice or deficiency sufficient to grant the Post-Conviction Relief Application on this ground. Applicant alleges counsel was ineffective for erroneously advising him of the sentence he would receive. This Court finds that Applicant was advised on the record at his plea that he could possibly receive a sentence as high as twenty years and that counsel advised him prior to the plea that the recommendation was for a cap of twenty years. Counsel testified that he discussed the pros and cons of taking the case to trial, which included the potential to be convicted and face the maximum possible sentence. Counsel testified that he discussed the possible sentences Applicant could receive once the decision was made to plead guilty. Counsel testified that he discussed with Applicant that it was to be a recommended cap of twenty years. Therefore, this Court finds that Applicant was properly advised of the possible sentences and this allegation is dismissed.

Failure to ensure Applicant was aware of his responsibilities on appeal

This Court finds that Applicant has failed to show prejudice or deficiency sufficient to grant the Post-Conviction Relief Application on this ground. Applicant alleges counsel was ineffective for failing to ensure Applicant had sufficient notice of Applicant's responsibilities to file a memorandum in order to perfect his appeal.

Counsel has a constitutionally-imposed duty to consult with defendant about appeal when there is reason to think either (1) that rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470 (2000). Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings. Id., 528 U.S. at 480. To show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for

counsel's deficient failure to consult with him about an appeal, he would have timely appealed. Id. 528 U.S. at 484.

In White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974), the South Carolina Supreme Court held that even if the post-conviction relief court finds that Applicant never voluntarily and intelligently abandoned his appeal, the court has no jurisdiction to grant a belated review of direct appeal issues. Therefore, where an accused establishes in a post-conviction relief hearing that he was unconstitutionally deprived of his statutory right to a direct appeal, the South Carolina Supreme Court, upon an appeal of the post-conviction relief decision, will review the trial record and pass upon all issues properly raised and argued as if the direct appeal has been perfected.

The record indicates, and counsel testified, that he filed a notice of appeal in Applicant's case. Counsel testified that in his notice of appeal he indicated that he did not have any meritorious issues upon which to base the appeal. Counsel testified that he sent a letter to Applicant on December 8th and on January 11th asking Applicant to provide any issues he felt needed to be appealed. Counsel testified that Applicant did not respond to those letters. Further, Applicant submitted his own memorandum as required and the Court dismissed the appeal. Therefore, this Court finds that Applicant has failed to meet his burden in proving both deficiency and prejudice on the part of counsel and this allegation is dismissed.

Failure to meet with Applicant and Failure to investigate

This Court finds that Applicant has failed to show prejudice or deficiency sufficient to grant the Post-Conviction Relief Application on this ground. Applicant alleges counsel was ineffective for failing to meet with him a sufficient number of times and for failing to investigate potential facts or defenses in this case.

Counsel and Applicant testified that they met twice before the guilty plea proceeding. Counsel testified that he reviewed the evidence with Applicant and thoroughly advised him as to the elements of kidnapping. Counsel testified that Applicant understood the elements of kidnapping. Counsel testified that Applicant did not have any witnesses or any leads for him to investigate further or that he was requested to do so. Therefore, Applicant has failed to meet his burden in proving deficiency or prejudice resulting from any action or inaction of counsel. Applicant has failed to show what difference, if any, additional meetings would have had on the result of the proceeding or that he was prejudiced. Additionally, Applicant has failed to show what additional investigation he wished counsel would have done and what prejudiced resulted from that action not being taken. Therefore, this Court dismisses these allegations.

Failure to object to Solicitor breaching plea agreement

This Court finds that Applicant has failed to show prejudice or deficiency sufficient to grant the Post-Conviction Relief Application on this ground. Applicant alleges counsel was ineffective for failing to object or move to withdraw the plea when the Assistant Solicitor's comments breached the plea agreement.

Counsel testified that he did not think the solicitor's comments went against the recommendation of a cap of twenty years. The solicitor stated that this was a recommendation for a cap of twenty years, that this is a very serious case, and that if the Court was inclined to go with the twenty years then that would be appropriate. Counsel testified, as stated earlier, that he advised Applicant that he could potentially receive a twenty year sentence. There is no indication in the record before this Court that the State's silence as to sentencing was ever a part of Applicant's plea deal. The record indicates that the plea deal was for a recommended sentencing cap of twenty years. Further, the solicitor simply stated that the case was indeed serious and that the Court would

be within its discretion to sentence Applicant at the higher end of the recommended sentencing range. Therefore, Applicant has failed to prove counsel was deficient for failing to object to something for which he had no articulable basis and that any prejudice resulted. This Court dismisses this allegation.

CONCLUSION

Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient, nor was Applicant prejudiced by Counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

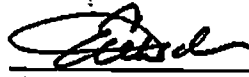
The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRPC, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 5th day of October, 2020.

10/11 



EDGAR W. DICKSON
Presiding Judge
Fourteenth Judicial Circuit

11/11 